Sanjung Selamat Sdn Bhd v CL Chin & Associates & Anor (Part 4)

HIGH COURT (KUALA LUMPUR) — CIVIL NO D4-22-67 OF 2005
ABDUL WAHAB PATAIL J
27 MAY 2005

Land Law — Restraint on dealings — Caveat — Removal of — Summary judgment sought to enforce against the defendant on an unconditional solicitor's undertaking to remove the defendants clients' caveat — First caveat was removed and second caveat entered based on the same grounds — Whether there were triable issues

The plaintiff seeks by encl 5 leave to enter summary judgment under O 14 of the Rules of the High Court 1980 to enforce against the defendant (a firm of solicitors) a written unconditional solicitor's undertaking dated 24 December 2004 in favour of the plaintiff to remove the defendants clients' caveat. The plaintiff is the registered proprietor of a piece of land. At all material times, the defendant is a firm of solicitors acting for Jayarena Construction Sdn Bhd for which company the defendant had lodged a private caveat (caveat no 1) on 4 June 2002 against the land. The reasons cited in the caveat application for caveat no 1 are that on 19 April 2002, a deed of assignment was entered into between the plaintiff and Jayarena together with a power of attorney in favour of Jayarena, and pending registration of its interest, Jayarena was afraid that the land may be disposed off to a third party. On 24 December 2002, the defendant wrote to the plaintiff giving an undertaking to remove the caveat. On 22 October 2003, caveat no 1 was withdrawn. A director of Jayarena, made a police report dated 3 November 2003 alleging that a crime to cheat Jayarena had been committed. On or around 6 November 2003, the defendant as Jayarena's agent/solicitor lodged caveat no 2 on behalf of Jayarena. The reasons cited in the caveat no 2 application form and statutory declaration are exactly the same as for caveat no 1. No grounds of allegation to cheat Jayarena was mentioned in the caveat application. The issue before the court in this application is whether there are triable issues, ie disputes of fact that require further investigation and if necessary be determined in a full trial. The first defendant submitted that since caveat no 2 was not in existence at the time the solicitor's undertaking was issued, it could not be relied upon to require the removal of caveat no 2. The second defendant was a party added in this action upon its own application at enclosure 17. Upon that application being allowed, the plaintiff sought amendment that prayers in its statement of claim to include the second defendant. The second defendant now relies upon the ground of a 'fundamental flaw' in that the amended writ, statement of claim and enclosure 5 have not been served upon the second defendant.

Held, allowing plaintiff's application:

(1) The grounds relied upon for caveat no 2 were exactly the same as the grounds

in the application for caveat no 1. For practical purposes, it was the same caveat and though filed at a different time, it was by the same party and through the same solicitors who had given the solicitor's undertaking (see para 13).

(2) From the foregoing grounds raised by the first defendant, it is evident that no issues of fact that require a trial to ascertain the truth are involved. Issues of law and of inferences or findings of fact drawn from other undisputed facts do not require a trial and are not triable issues. There are no triable issues disclosed in this case as would prevent summary disposal (see para 16).

(3) A solicitor's undertaking is a special undertaking. It is not frequently issued. Its value does not rely solely upon the personal assets of the solicitor, but more upon the integrity of a solicitor, his profession and as an officer of the court. For this reason, such undertaking is held in higher esteem than the undertaking of his client who may be worth very many times more in asset terms. The solicitor's undertaking is also an undertaking on the solicitor's part that he has so satisfied himself of that his client's undertaking that he is prepared to give it himself. The solicitor is protected by not allowing a client who is aware of his solicitor's undertaking, from reneging from it, for even though the client may not have given the undertaking himself, his solicitor's undertaking is his undertaking because the acts of his solicitor on his behalf are his acts (see para 17).

(4) It must be borne in mind that it is the second defendant who has applied to be included into an existing proceeding as an additional party. The second defendant must, therefore, be fully conversant with the pleadings in the proceeding, and need not be supplied with pre-existing documents unless he has requested and an order to that end was granted. The second defendant, in this case, is also represented by the same firm of solicitors. There is no question of not being familiar with all of the action (see para 21).

[Bahasa Malaysia summary

Plaintif menuntut melalui lampiran 5 untuk memasukkan penghakiman terus di bawah Aturan 14 Kaedah-kaedah Mahkamah Tinggi 1980 untuk melaksanakan terhadap defendan (sebuah firma peguamcara) satu akujanji peguamcara bertulis tanpa syarat yang memihak kepada plaintif bertarikh 24 Disember 2004 membatalkan kaveat anakguam defendan. Plaintif adalah pemilik berdaftar satu hartanah. Pada kesemua masa yang material, defendan adalah satu firma peguamcara yang bertindak bagi pihak Jayarena Construction Sdn Bhd yang mana defendan telah bagi pihak syarikat tersebut memasuki satu kaveat persendirian (kaveat no 1) pada 4 Jun 2002 terhadap tanah tersebut. Alasan yang dinyatakan dalam permohonan kaveat untuk kaveat no 1 ialah bahawa pada 19 April 2002 satu suratikatan penyerahhakan dimasuki di antara plaintif dan Jayarena bersama dengan satu surat kuasa wakil yang memihak kepada Jayarena, dan sementara menunggu pendaftaran kepentingan, Jayarena bimbang tanah tersebut dilupuskan kepada pihak ketiga. Pada 24 Disember 2002, defendan menulis kepada plaintif memberikan akujanji untuk mengeluarkan kaveat tersebut. Pada 22 Oktober 2003 kaveat no 1 ditarik balik. Seorang pengarah Jayarena, membuat laporan polis bertarikh 3 November 2003 mengatakan bahawa satu penipuan ke atas Jayarena telah dilakukan. Pada atau

lebih kurang 6 November 2003, defendan sebagai agen/peguamcara Jayarena memasukkan kaveat no 2 bagi pihak Jayarena. Alasan yang dinyatakan di borang dan deklarasi statutori kaveat no 2 adalah sama dengan kaveat no 1. Tiada alasan pengataan penipuan ke atas Jayarena dinyatakan dipermohonan kaveat tersebut. Isu sebelum mahkamah dalam permohonan ini ialah samada terdapat isu-isu yang perlu dibicarakan, iaitu pertikaian fakta yang memerlukan penyiasatan selanjutnya dan jika perlu diputuskan diperbicaraan penuh. Defendan pertama menghujahkan bahawa oleh kerana kaveat no 2 tidak wujud apabila akujanji peguamcara dikeluarkan, ia tidak boleh didasarkan untuk membatalkan kaveat no 2. Defendan kedua adalah pihak yang ditambahkan di dalam tindakan ini atas permohonannya di lampiran 17. Setelah permohonan ini dibenarkan, plaintif menuntut untuk meminda permohonannya di dalam pernyataan tuntutan untuk memasukkan defendan kedua. Defendan kedua kini menggunakan alasan 'fundamental flaw' bahawa writ pindaan, pernyataan tuntutan dan lampiran 5 tidak disampaikan kepadanya.

Diputuskan, membenarkan permohonan plaintif:

(1) Alasan-alasan untuk kaveat no 2 adalah serupa, sama dengan alasan-alasan untuk permohonan kaveat no 1. Untuk tujuan praktik, ia adalah kaveat yang sama walaupun difailkan pada masa yang berlainan, ia adalah oleh pihak yang sama melalui peguamcara yang sama yang telah memberikan akujanji tersebut (lihat perenggan 13).

(2) Daripada alasan-alasan yang dibangkitkan oleh defendan pertama, ia adalah jelas ia tidak melibatkan isu fakta yang memerlukan perbicaraan untuk menentukan kebenaran. Isu-isu undang-undang dan inferen atau carian fakta yang diperolehi daripada fakta-fakta lain yang tidak dipertikaikan tidak memerlukan satu perbicaraan dan bukannya isu-isu yang perlu dibicarakan. Tiada isu-isu yang perlu dibicarakan dalam kes ini yang dapat menghalang ia diberi penghakiman terus (lihat perenggan 16).

(3) Akujanji seseorang peguamcara adalah akujanji yang khas. Ia tidak selalu dikeluarkan. Nilainya tidak bergantung hanya atas aset persendirian peguamcara, tetapi lebih atas kewibawaan seseorang peguamcara, profesyennya dan sebagai pegawai mahkamah. Atas alasan ini, akujanji sebegini disanjung lebih tinggi daripada akujanji anakguamnya yang bernilai dalam erti kata aset. Akujanji seseorang peguamcara juga merupakan akujanji peguam bahawa beliau telah bagi pihaknya memenuhi dengan akujanji anakguamnya sendiri sehingga beliau bersedia memberikannya sendiri. Peguamcara adalah dilindungi dengan tidak membenarkan anakguamnya yang menyedari akan akujanji peguamcaranya, daripada membatalkannya, walaupun anakguam tersebut mungkin tidak memberikan akujanjinya sendiri, akujanji peguamcaranya adalah akujanjinya oleh kerana tindakan peguamcaranya bagi pihaknya adalah tindakannya (lihat perenggan 17).

(4) Adalah perlu diingatkan bahawa adalah defendan kedua yang memohon untuk dimasukkan ke dalam prosiding semasa sebagai pihak tambahan. Dengan itu defendan kedua semestinya, betul-betul maklum dengan pliding-pliding di dalam prosiding ini, dan tidak perlu diserahkan dengan dokumen-dokumen

yang sedia ada kecuali beliau memohon untuknya dan satu perintah diberikan. Defendan kedua dalam kes ini juga diwakili oleh firma peguamcara yang sama. Tiada soalan tidak mempunyai pengetahuan dengan kesemua tindakan tersebut (lihat perenggan 21).]

Notes

For cases on caveat, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3480–3824.

Legislation referred to

Rules of the High Court 1980 O 14

David Hoh (Lim & Hoh) for the plaintiff.
Alex De Silva (De Silva & Co) for the first defendant.
James Edwin (Colin Victor George with him) (James Edwin & Co) for the second defendant.

Abdul Wahab Patail J:

(ENCL 5) (AS AMENDED AT ENCL 32)

[1] The plaintiff seeks by encl 5 leave to enter summary judgment under O 14 of the Rules of the High Court 1980 to enforce against the defendant (a firm of solicitors) a written unconditional solicitor's undertaking dated 24 December 2004 in favour of the plaintiff to remove the defendants clients' caveat (caveat no 2) registered on the land HS(D) 112761, PT No 1429, Mukim Damansara, Daerah Petaling, Negeri Selangor.

[2] The plaintiff is the registered proprietor of the said land.

[3] At all material times the defendant is a firm of solicitors acting for Jayarena Construction Sdn Bhd, for which company the defendant had lodged (presentation No 21896/2002) a private caveat (caveat no 1) on 4 June 2002 against the land.

[4] The reasons cited in the caveat application for caveat no 1 are that on 19 April 2002, a deed of assignment was entered into between the plaintiff and Jayarena together with a power of attorney in favour of Jayarena, and pending registration of its interest, Jayarena was afraid that the land may be disposed off to a third party.

[5] On 23 December 2002, the defendant wrote directly to the plaintiff giving an undertaking as follows:

> We act for Jayarena Construction Sdn Bhd. We are instructed to say that our client undertakes to remove its caveat on the said land as per your request.
>
> Yours faithfully,
>
> cc Jayarena Construction Sdn Bhd

[6] Subsequently, on 24 December 2002, the defendant issued a solicitor's letter of undertaking to the plaintiff as follows:

> The above matter and our letter dated 23 December 2002 refers, We act for Jayarena Construction Sdn. Bhd.
>
> We unconditionally undertake to remove our client's caveat registered on the said land.
>
> Yours faithfully,
>
> cc Jayarena Construction Sdn Bhd
>
> The above matter, your instructions and our letter dated 23 December 2002 refer.

[7] On 22 October 2003, caveat no 1 was withdrawn. A director of Jayarena, Dato' Abu Bakar bin Mohamed made a police report (No 14840/03) dated 3 November 2003 alleging that a crime to cheat Jayarena had been committed.

[8] On or around 6 November 2003, the defendant as Jayarena's agent/solicitor lodged (presentation No 44592/2003) caveat no 2 on behalf of Jayarena. The reasons cited in the caveat no 2 application form and statutory declaration are exactly the same as for caveat no 1. No grounds of allegation to cheat Jayarena was mentioned in the caveat application.

[9] On 2 December 2004, the plaintiff's former solicitors Messrs Lee & Lim issued a letter to demand from the defendant that the defendant honours its solicitor's undertaking and discharge caveat No 2 within 48 hours. The defendant failed to do so. A writ was filed on 14 January 2005. Enclosure 5 is the plaintiff's application for summary judgment. The issue before the court in this application is whether there are triable issues. The term 'triable issues' means not just any issue, any party or parties seek trial on, but disputes of fact that require further investigation as to their truth available in the pre-trial discovery, production, verification, and interrogatory procedures and if necessary be determined in a trial with examination, cross and re-examination of witnesses.

[10] The land in this case was the subject of a joint venture agreement entered into on 30 March 2004 between the plaintiff and Goldmount Resources Sdn Bhd as developer. The developer had proceeded with the development and as at 23 February 2005 all 69 commercial lots had been sold to purchasers. Caveat no 2 affects these purchasers by preventing the developer and the plaintiff to deliver title, and would result in claims for loss and damages arising from late delivery.

THE FIRST DEFENDANT

[11] It was submitted for the first defendant that the plaintiff cannot rely upon the solicitor's undertaking for the reason it had not been produced In the affidavit in support at encl 6 of the application at encl 5. However, it is noted that the solicitor's

undertaking itself was not denied, the submissions thereon being confined to the ground it had not been exhibited. Given the limited nature of the objection, and no submission having been made why further investigation of the document is required, it is clear the objection is purely upon a technicality, and no injustice would be occasioned to the defendant if it is taken into consideration. For this reason the objection was dismissed.

[12] It was then submitted for the first defendant that since caveat no 2 was not in existence at the time the solicitor's undertaking was issued, it could not be relied upon to require the removal of caveat no 2. It was submitted that the words 'remove our client's caveat registered on the said land' applied to the then existing caveat. It was further submitted that:

> Nowhere in the letter is any express undertaking or promise to remove all future caveats lodged on the land nor even an undertaking not to lodge any future caveats. If that is what the plaintiff wants this honourable [court] to impute or imply from the letter, then surely that can only be done with the benefit of a full trial. This cannot be done summarily. Witnesses would have to be called to establish what the plaintiff claims now that the letter of 24 December 2002 also covers the second caveat and an undertaking not to lodge future caveats, although clearly the letter does not contain any such undertaking [sic].

[13] The grounds relied upon for caveat no 2 were exactly the same as the grounds in the application for caveat no 1. For practical purposes, it was the same caveat and though filed in a different time, it was by the same party and through the same solicitors who had given the solicitor's undertaking.

[14] A further ground relied upon was that the solicitor's undertaking must be read in the light of the plaintiff's letter of 18 December 2002 that:

> In the event we (the plaintiff) fail to pay the said guarantee sum to you in full by 31 December 2003, you (the second defendant) shall be at liberty to deal with the said Land as you deem fit.

[15] Bearing in mind that caveat no 2 was lodged on or about 6 November 2003, it is clear that it did not because it could not possibly rely upon the plaintiff's letter of 18 December 2002 as the basis.

[16] From the foregoing grounds raised by the first defendant, it is evident that no issues of fact that require a trial to ascertain the truth are involved. Issues of law and of inferences or findings of fact drawn from other undisputed facts do not require a trial and are not triable issues. There are no triable issues disclosed in this case as would prevent summary disposal.

[17] A solicitor's undertaking is a special undertaking. It is not frequently issued. Its value does not rely solely upon the personal assets of the solicitor, but more upon the integrity of a solicitor, his profession and as an officer of the court. For this reason, such undertaking is held in higher esteem than the undertaking of his client who may be worth very many times more in asset terms. The solicitor's undertaking

is also an undertaking on the solicitor's part that he has so satisfied himself of that his client's undertaking that he is prepared to give it himself. The solicitor is protected by not allowing a client who is aware of his solicitor's undertaking, from reneging from it, for even though the client may not have given the undertaking himself, his solicitor's undertaking is his undertaking because the acts of his solicitor on his behalf are his acts.

[18] Although the first defendant had conveyed his client's undertaking, it is clear by his issue of the solicitor's undertaking that more than the client's undertaking had been necessary. In other words, the solicitor's undertaking was relied and acted upon.

[19] The solicitor's undertaking must, therefore, be honoured by the first defendant as well as his client.

THE SECOND DEFENDANT

[20] The second defendant was a party added in this action upon its own application at encl 17. Upon that application being allowed, the plaintiff sought amendment that prayers in its statement of claim to include the second defendant. The second defendant now relies upon the ground of a 'fundamental flaw' in that the amended writ, statement of claim and encl 5 have not been served upon the second defendant.

[21] It must be borne in mind that it is the second defendant who has applied to be included into an existing proceeding as an additional party. The second defendant must, therefore, be fully conversant with the pleadings in the proceeding, and need not be supplied with pre-existing documents unless he has requested and an order to that end was granted. The second defendant, in this case, is also represented by the same firm of solicitors. There is no question of not being familiar with all of the action.

[22] While submission is made upon the 'fundamental flaw', no submission is made as to what, if any, prejudice is caused.

[23] A further ground raised by the second defendant is that a previous summary judgment application in the High Court of Malaya in Shah Alam in Suit MT3-24-621 of 2004 by the plaintiff relying upon the second defendant's undertaking had been rejected.

[24] It is the decision of this court, therefore, that no reliance upon the second defendant's undertaking as conveyed in the solicitor's letter of 23 December 2002 can be sustained since that issue had been dealt with in Shah Alam MT3-24-621 of 2004. This decision is confined to the solicitor's undertaking of 24 December 2002.

[25] The ground relied upon in the application for the caveat no 1 dated 4 June 2002 is that on 19 April 2002 a deed of assignment was enteted into between the plaintiff and Jayarena together with a power of attorney in favour of Jayarena, and

pending registration of its interest, Jayarena was afraid that the land may be disposed off to a third party. While this may suggest that Jayarena has, by virtue of the deed of assignment an interest in the land, this matter is no longer relevant in the light of the fact that the solicitor's undertaking was issued on 24 December 2002. An alluded to earlier above, caveat no 2 is nothing more than a re-run of caveat no 1 upon which the first defendant had given a solicitor's undertaking for the second defendant to remove, and for so long as the solicitor's undertaking remains in existence and honoured, it must stay removed.

[26] For the reasons set out in respect of the first defendant, the second defendant is bound by the undertaking issued by their solicitors.

[27] Orders were therefore granted as prayed encl 32 prayer (a), (b), (c), (d), (e).

Plaintiff's application allowed.

Reported by Sally Kee